United States Court of Appeals

for the Second Circuit

APPELLANT'S PETITION FOR REHEARING

75-1138

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1138

UNITED STATES OF AMERICA,

Appellee,

—v.—

LOUIS R. WOLFISH,

Defendant-Appellant.

On Appeal From The United States District Court

For The Southern District Of New York

APPELLANT'S PETITION FOR REHEARING

AND SUGGESTION FOR REHEARING IN BANC

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PETITION BY APPELLANT FOR REHEARING AND
SUGGESTION FOR REHEARING IN BANC

PRELIMINARY STATEMENT

Appellant respectfully petitions for rehearing and suggests rehearing in banc, of the decision by a panel of the Court (Associate Justice Clark and Judges Mansfield and Mulligan) filed August 14, 1975, affirming his conviction on three counts of mail fraud pursuant to 18 U.S.C. 1341.

REASONS FOR THIS PETITION

The panel affirmed the conviction of appellant, an Attorney in good standing in the trial court, the United States District Court for the Southern District of New York (Tr. P. 10 and Exhibit A attached hereto), for devising a scheme to defraud the Bankers Security Life Insurance Society out of approximately $200,000 in life insurance proceeds through the use of the mails in violation of 18 U.S.C. 1341.

The Appellant respectfully submits that the grounds stated for affirmation are without foundation and contrary to clear precedents of this Court announced both before and after the holding in this case.

The panel overlooked or misapprehended many points of law and fact in rendering its decision of affirmance.

Although this is an appeal following conviction at a nine day trial for a crime which is hardly heinous, the issues involved have crucial significance in any criminal case in which :

a) An attorney in good standing before the court is prevented by the trial court from acting as counsel or co-counsel.

b) Criminal defendants are prevented by the trial court from acting Pro-se or as co-counsel.

c) Criminal defendants do not take the stand to testify and the trial court instructs the jury that "You may draw no unreasonable inferences against the defendant because he did not take the stand and testify". (emphasis supplied)

d) Government prosecutors serve and file false Statements of Readiness in criminal cases in violation of Rule 4 of the District Court Rules.

District Judges in this Circuit must have a uniform

standard and basis for rendering decisions in the above questions. The opinions rendered by the panel in the Wolfish case will create confusion by enunciating authority never previously found warranted and which is wholly unnecessary, misleading and illegal.

We recognize, of course, that in reaching its factual conclusions in this case the panel was required at this stage to view the record in the light most favorable to the Government. We believe, however, that there are several instances where the panel has made factual assertions that are either erroneous or incomplete. While none of these statements is, in itself, of overriding significance, the accumulation of these instances may have adversely affected the panel's assessment of appellant's conduct. We are therefore, appending hereto a list of the more significant misstatements, together with a brief indication of the reasons why we believe these statements are not accurate.

PROPOSED QUESTIONS UPON REHEARING
AND SUGGESTION FOR REHEARING IN BANC

1. Did the trial court in denying the appellant, an Attorney in good standing before the trial court, the right to act as counsel or co-counsel, violate the constitutional rights of the appellant to due process and equal protection? The panel answered in the negative.

2. Did the trial court in denying the appellant, an attorney in good standing before the trial court, the right to act as counsel or co-counsel, violate the constitutional rights of the appellant under the Sixth Amendment to retain counsel of his own choice and to act pro-se? The panel answered in the negative.

3. Must a defendant in a criminal proceeding prior to exercising his constitutional right to act pro se or as co-counsel first discharge his trial counsel? The panel answered in the affirmative.

4. May the Circuit Court of Appeals in its supervisory jurisdiction over the District Court and Attorneys practicing before the District Court vacate a judgment of conviction against an appellant-attorney in good standing who was denied the right to act as counsel or co-counsel by the District Court? The panel answered in the negative.

5. Is the charge to the jury, "You may draw no unreasonable inferences against the defendant because he did not take the stand and testify", plain error and a violation of the constitutional rights of the appellant to due process and equal protection and under Fifth Amendment? The panel answered in the negative.

6. Is the failure by the trial court to dismiss the indictment because the Government served and filed a false

statement of readiness and violated Rule 4 of the District Court Rules regarding prompt disposition of criminal cases a violation of the constitutional rights of the appellant to due process and equal protection? The panel answered in the negative.

7. Where contacts between United States law enforcement agents and Israeli authorities in turn, led to an illegal search by Israeli authorities of appellant's apartment in Israel, illegal by American standards, did the refusal by the District Court to suppress the physical evidence seized violate the Fourth and Fifth Amendment rights of the appellant? The panel answered in the negative.

ARGUMENT

POINT I

THE PANEL ERRONEOUSLY OVERLOOKED FACT THAT APPELLANT WAS AND STILL IS AN ATTORNEY IN GOOD STANDING BEFORE TRIAL COURT AND THE REFUSAL BY THE TRIAL COURT TO PERMIT APPELLANT TO ACT AS HIS OWN COUNSEL OR CO-COUNSEL WAS A VIOLATION OF THE CONSTITUTIONAL RIGHTS OF APPELLANT TO DUE PROCESS AND EQUAL PROTECTION AND UNDER THE FIFTH AND SIXTH AMENDMENTS

The trial court refused to permit Saxe, Bacon, et al. to withdraw as attorneys of record for appellant and also refused to permit Michael Rosen, Esquire, to withdraw as trial counsel for appellant. The trial court also prevented the appellant, an attorney in good standing before the trial court, from appearing on his own behalf as counsel or co-counsel.

Nowhere in the entire decision of the panel, does the panel take cognizance of the crucial and critical fact that appellant was and still is an attorney in good standing before the trial court, and that appellant made several pre-trial motions pro se.

The appellant repeatedly pointed out to the court prior to trial that appellant was an attorney in good standing before the trial court, the U.S. District Court for the Southern District of New York (Tr. P. 8-11, January 6, 1975 - 9:30 a.m. and Exhibit A attached hereto).

In addition, the panel overlooked the fact that the trial court refused to recognize the appellant as his own counsel, notwithstanding the fact that appellant was an attorney in good standing before trial court, when appellant made pre-trial motions to dismiss indictment because Government had filed a false statement of readiness under Rule 4 of the rules of the trial court and that the trial court also refused to rule upon the pre-trial cross-motion of appellant to determine the earned legal fees of withdrawing attorney of record, Saxe, Bacon, et al.and Roy Cohn, Esquire and trial counsel Michael Rosen, Esquire. In the pre-trial cross-motion of appellant, appellant consented and joined in the motion of withdrawal.

In addition, the panel overlooked the fact that appellant repeatedly asked to be his own counsel, co-counsel, cross examine witnesses, deliver summation, speak on his own behalf, poll jurors after verdict and make motions on his own behalf and was repeatedly rebuffed by the trial court.

The following colloquy took place between the trial court and the appellant: (Tr. P 7-11, January 6, 1975 - 9:30 a.m.)

"DEFENDANT WOLFISH: Well, your Honor, I don"t want to shoot dice with my life. As your Honor has said on Friday, and I believe even prior to Friday, that your Honor has no objection to me representing myself, or as Mr. Schatten says in his affidavit, he has no objection to having both Mr. Rosen and Mr. Cohn or anyone else represent me. My application is, your Honor, that I would like to have permission of the Court to serve as co-counsel in my case in order to take an active part in my defense since your Honor did not direct Mr. Roy Cohn, who, it is still my position, who I originally retained to defend me so that I could therefore act as co-counsel in this case with Mr. Rosen in conducting my defense. I don't want to shoot dice with my own life.

THE COURT: That application is denied.

.....

DEFENDANT WOLFISH: I didn't make the motion to withdraw. I didn't initiate it. It was initiated by Mr. Rosen. You recall, your Honor, my original position was I opposed the motion on the grounds that Roy Cohn was my attorney. I know the rules of evidence, your Honor. I know that many times the United States Attorney's office themselves have two or three even Assistant United States Attorneys prosecuting on a case. I know, however, that only one attorney can take on a witness, whether it is on direct or cross examination and I wouldn't want to violate any rules of evidence and I am torn (an attorney).

THE COURT: Are you still arguing the motion to be allowed to be co-counsel?

DEFENDANT WOLFISH: I just want to say one other thing, your Honor.

THE COURT: What is that one thing?

DEFENDANT WOLFISH: As far as I know, your Honor, as of this day I am still an attorney in good standing in the Southern District. If your Honor seeks to check the records --

THE COURT: And, therefore, what?

DEFENDANT WOLFISH: Therefore, I say to your Honor that I have the right of the Sixth Amendment to choose my counsel.

THE COURT: I have already ruled on all of this. If you

have something new to add, say it.

DEFENDANT WOLFISH: I just want to say that I have the right to also defend myself, your Honor. I have this right to also defend myself as co-counsel and, therefore, I say to your Honor, in all interests of justice, to at least permit me to participate in my own defense. I am not someone who is not trained in the law, and I am still an attorney in good standing before the Southern District, as far as I know. If your Honor seeks to check the records in the clerk's office --

THE COURT: No, I don't need to check the records because I made my decision and I believe I am on sound ground."

The trial court in denying the appellant to act as his own counsel or co-counsel, thereby denied the appellant his rights under the Constitution to due process and equal protection and under the Fifth and Sixth Amendments.

The panel in erroneously ruling, that the appellant prior to exercising his constitutional right to act as his own counsel or co-counsel had to first discharge his attorney of record and trial counsel, simply overlooked the cross-motion by appellant at pre-trial consenting to discharge of Saxe, Bacon, et al. as attorneys of record and Michael Rosen, Esquire as trial counsel and which cross-motion trial court refused to rule upon.

The panel also overlooked the fact the trial court refused to grant the motion of Saxe, Bacon, et al. as attorneys of record and Michael Rosen, Esquire, to withdraw from representing appellant. As a result of the rulings of the trial court the appellant was between the devil and the deep blue sea.

The panel also overlooked the fact that Michael Rosen, Esquire was directed to act as trial counsel for appellant against the wishes of appellant and Michael Rosen, Esquire.

The panel also overlooked the fact that appellant repeatedly informed the trial court that Saxe, Bacon, et al. and Michael Rosen, Esquire, were never in fact retained by the appellant.

The panel also overlooked the legal dicta of this Circuit Court, that a defendant in a Federal Criminal Proceeding, though himself an attorney in good standing before the trial court and though acting as his own counsel had a constitutional right to assistance of counsel and that it was also incumbent upon the trial court to inform such a defendant-attorney of his constitutional right to assistance of counsel. United States v. Harrison, 451 F. 2d 1013 (2nd Ci. 1971).

Yet, this panel would have us believe that before the appellant could exercise his constitutional rights to act as his own counsel or co-counsel, the appellant was first required to waive his constitutional rights to assistance of counsel.

Assuming arguendo, that Attorney Rosen had been retained by Wolfish, there is no doubt that Wolfish had a legal right to appear as his own co-counsel since he was an attorney in good standing before the trial court, without discharging Rosen.

This panel also overlooked the legal dicta of this Circuit Court in the following case , though unreported, is res judicata in this circuit:

" The District Court is directed, ... to permit appellant to defend himself pro se, provided assigned counsel remains with him throughout the trial for consultation " Echeverria v. United States District Court, No. 74-80[illegible], 74-1240 (2d Cir., Feb. 14, 1974)(unreported).

Yet, this panel is heard to say:

"Nor did the trial court err in refusing to permit Wolfish to participate as co-counsel in his case. If he wished to handle the case pro se, Wolfish should have discharged his retained counsel. This he did not do and, therefore, may not now be heard to complain of any deprivation of Sixth Amendment rights." (slip op. at 5642 and 5643)

This panel erroneously equates the acting pro se with the request by Wolfish to act as co-counsel.

And last but not least, this panel overlooked the recent ruling by the United States Supreme Court on June 30, 1975, one week after argument was heard by this panel in the Wolfish case, in Faretta v. California, No. 73-5772, (U.S. Sup. Ct., filed June 30, 1975) wherein the Supreme Court states:

"The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense. It is the accused, not counsel, who must be 'informed of the nature and cause of the accusation,' who must be 'confronted with witnesses against him,' and who must be accorded 'compulsory process for obtaining witnesses in his favor. Although not stated in the Amendment in so many words, the right to self-representation-- to make one's own defense personally -- is thus necessarily implied by the structure of the Amendment. The right to defend is given directly tc the accused; for it is he who suffers the consequences if the defense fails.

The counsel provision supplements this design. It speaks of the 'assistance' of counsel, and an assistant, however expert, is still an assistant. The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant-- not an organ of the State interposed between an unwilling defendant and his right to defend himself personally.To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment. In such a case, counsel is not an assistant, but a master; and the right to make a defense is stripped of the personal character upon which the Amendment insists.

The Sixth Amendment, when naturally read, thus implies a right of self-representation."

The panel took note of Faretta at slip op. 5643.

This panel in a rather learned footnote takes note of Faretta and makes short shrift of it, by stating that it is inapplicable because it involved a state criminal case and only holds that a defendant may proceed to trial without counsel.

The fact of the matter is that Faretta like Wolfish after having been denied the right to act pro se demanded the right to act as co-counsel, and which was also denied.

This panel erroneously states in the said footnote no. 2 at slip op. at 5643:

"There is nothing in Faretta or in any statute which suggests that a defendant may both have an attorney and represent himself."

The language in Faretta is quite clear that a defendant in a criminal proceeding has the right to represent himself with the assistance of counsel, which is exactly what Wolfish desired and was refused by the trial Court, when he asked to be co-counsel.

Even the dissenters in Faretta, would have agreed that Wolfish an attorney in good standing before the trial court had a constitutional right not only under the Sixth Amendment but also under due process and equal protection to have acted as his own counsel or co-counsel.

Wolfish in asking to act as co-counsel in his final futile attempt to represent himself, was in reality also asking to be represented by two attorneys, which was his constitutional right. If it is proper for the Government then it is proper for the defendant. What is sauce for the goose is sauce for the gander. To deny Wolfish this right is to also deny him the right to retain counsel of his own choosing, namely, himself.

The decision of the trial court denying the appellant, an attorney in good standing before the trial court, the right to appear on his own behalf as either counsel, co-counsel or pro-se was entirely arbitrary, capricious, unreasonable, illegal, an abuse of discretion and a violation of due process and equal protection.

A reversal is mandated, on the additional grounds that the Circuit Court of Appeals in its supervisory jurisdiction over the District Courts and the Attorneys practicing before the District Courts should vacate a judgment of conviction against an appellant -attorney in good standing who was denied the right to act as counsel or co-counsel on his own behalf by the District Court.

This panel also overlooked United States v. Plattner, 330 F.2d 271 (2d Cir. 1964); U.S. ex rel. Maldonado v. Denno, 348 F.2d 12 (2d Cir. 1965); Von Moltke v. Gillies, 332 U.S. 708; Schell v. United States, 423 F2d. 101 (7th Cir. 1970); Rule 44, Fed. R. Crim. Proc.

POINT II

THE PANEL OVERLOOKED THE MOST CRITICAL FACT THAT THE CHARGE TO THE JURY "YOU MAY DRAW NO UNREASONABLE INFERENCES AGAINST THE DEFENDANT BECAUSE HE DID NOT TAKE THE STAND AND TESTIFY" WAS PLAIN ERROR AND A VIOLATION OF THE CONSTITUTIONAL RIGHTS OF THE APPELLANT TO DUE PROCESS AND EQUAL PROTECTION AND FIFTH AMENDMENT RIGHT TO REMAIN SILENT.

With reference to the foregoing charge, the panel at slip op. 5636, states:

" The first assignment of error raises objection to what appears to be an unfortunate slip of the trial judge's tongue. It appears to us that the court intended to say that no 'unfavorable' inferences might be drawn from the defendant's failure to take the stand." (emphasis supplied)

This panel would have the appellant go to jail illegally because of the trial judge's "unfortunate slip of the tongue" dealing with the appellant's most basic and critical constitutional right to remain silent and not testify.

Must the appellant be the scape goat for the misfortune of the trial court's constitutional "slip of the tongue"?

To compound this error the panel would have us believe that they know what the trial court intended to say and therefore the jury also knew what the trial court intended to say. The panel would have us believe that in the mind of the jury "unreasonable" and "unfavorable" mean the same. How ludicrous a defense of the trial court's "unfortunate slip of the tongue". The record is clear.

This panel has now opened the door for juries in criminal cases to draw reasonable unfavorable inferences against defendants when they fail to take the stand and testify on their own behalf.

This panel has overlooked the decision of this Circuit Court rendered on June 18, 1975, five days prior to argument in Wolfish, in United States v. Barry, No. 75-1060, at slip op. 4118, where Chief Judge Kaufman states on behalf of the Court:

" Although jurors are far less sensitive than computers to nuances in instruction, an erroneous charge by a trial judge may affect the jury in unaccountable ways and, in some instances, a defendant may be deprived of vital procedural safeguards. Exactly what transpired in the jury room will never be known. But the district court's failure to charge the jury as required raises the likelihood that the jury was led astray and accordingly, requires a new trial."

Can and may jurors interpret "an unfortunate slip of the trial judge's tongue"?

In short, the Fifth Amendment's unmistakable intent was to provide adequate protection against the use against the accused of his failure to testify, clearly included a desire that the jury play no part in weighing the evidence of the silence by the accused and that the jury be prevented from drawing any reasonable unfavorable inferences, against the accused.

The failure to so charge is plain error.

This panel also overlooked the decision of this Circuit Court on May 21, 1975, rendered in the case of United States v. Bright, Docket No. 74-2447, at slip op. 3630:

"The juror's difficult task of probing the mind and will of another person is hard enough with the aid of a charge that balances the countervailing considerations. His verdict becomes suspect when he has not had the benefit of a balanced instruction from the court."

In Wolfish the jury's task was made even more difficult because it had to probe the mind of a judge who slipped them an "unfortunate slip of the tongue".

It was also error for the panel to state at slip op.5637:

"in light of the clarity of the overall language and the overwhelming proof of guilt -- the error was harmless."

Overwhelming proof of guilt can never overcome plain error and create harmless error.

It was also error for the panel to state at slip op. 5637:

"Moreover, Wolfish's experienced trial counsel never objected during the trial."

The fact of the matter is, that trial counsel for appellant did in fact object at the conclusion of the charge to the jury, when he stated:

"Your Honor, I most respectfully renew the objections I had made to the failure to charge certain requested defendant's charges and I take exception to the charges given to the jury." (Tr. 1128)

Appellant had requested in writing that the trial court in charging the jury that "no comment whatsoever should be made concerning defendant's failure to testify", and then orally gave the trial court the option to charge "no unfavorable inferences". (Tr. 958)

Nevertheless, the trial court charged, "no unreasonable inferences".

In light of all the circumstances and the entire record,

the error was not harmless.

If this Court believes defense counsel here seriously erred, in that objection was not taken strenuously or specifically enough, but cf. United States v. Squires, 440 F.2d 859, 863 (1971), the proper remedy is to fault counsel, but not to subject appellant to a criminal conviction by a jury which was not properly instructed on this crucial element, especially in view of the fact that appellant continuously both before and during and after trial insisted that trial counsel was not his attorney and that the trial court repeatedly refused to permit the said trial counsel to withdraw and repeatedly refused to permit the appellant to act as his own counsel or co-counsel. United States v. Garguilo, 310 F.2d 249, 254 (2d Cir. 1962); Henry v. Mississippi, 379 U.S. 443, 451; Brookhart v. Janis, 384 U.S. 1, 7-8; Fay v. Noia, 372 U.S. 391, 439.

For the panel to read the charge in its entirety and whitewash it, and thereby equate "inference" with "speculate" and "presumption", since the remainder of the charge makes no other reference to "inference" is to simply redefine the King's English.

A speculation is mere guesswork or surmise or a gamble and not based on serious thought whereas an inference is a proposition deduced as a logical consequence from other facts or a state of facts already proved or admitted. The two words convey meanings worlds apart.

A "presumption" and an "inference" are not the same thing, a presumption being a deduction which the law requires a trier of facts to make, an inference being a deduction which the trier of facts may or may not make, according to his own conclusions; a presumption is mandatory, an inference, permissible. Cross v. Passumpsie Fiber Leather Co., 90 Vt. 397, 98 A.1010, 1014; Joyce v. Missouri & Kansas Telephone Co., Mo. App., 211 S.W. 900, 901.

The charge clearly permitted the jury to make reasonable unfavorable inferences of which many were available, since the case rested on inference and circumstantial evidence. Virgin Islands v. Bell, 392 F.2d 207.

Griffin v. California, 380 U.S. 609 (1965) and Fontaine v. California, 390 U.S. 593 (1968) all prohibit the Court from solemnizing the silence of the accused into evidence against him, which this panel has seen fit to do.

An inference is not a speculation.

An inference is not a presumption.

A reversal is mandated.

POINT III

THE PANEL OVERLOOKED THE FACT THAT WHEN THE TRIAL COURT REFUSED TO DISMISS THE INDICTMENT BECAUSE THE GOVERNMENT FILED A FALSE STATEMENT OF READINESS UNDER RULE 4 OF THE DISTRICT COURT RULES WAS A VIOLATION OF DUE PROCESS AND EQUAL PROTECTION.

The panel excuses the filing by the Government of a false statement of readiness because of the subsequent resignation of Judge Bauman, even though Government never defended or answered the motion to dismiss indictment either pre-trial or at trial.

Judge Bauman resigned on August 1, 1974. The Government announced on July 8, 1974, that it was prepared to go to trial on July 22, 1974. This panel erroneously held that therefore the Government was excused on August 1, 1974, for its false statement of readiness nunc pro tunc, which in effect is an ex post facto violation of the constitutional rights of the appellant.

Rule 4 doesnot require the Court to be ready within 6 months from the date of arrest. Rule 4 requires the Government to be ready within six months from the date of arrest.

Rule 4 and the filing of true statements of readiness by the Government were meant to protect the rights of defendants and not to permit the abuses by the Government of the constitutional rights of defendants, and the Government was in default in answer to motion to dismiss.

This panel clearly overlooked Barker v. Wingo, 407 U.S. 520, 530, where the Court states:

"Closely related to length of delay is the reason the government assigns to justify delay. We have indicated on previous occasions that it is improper for the prosecution intentionally to delay 'to gain some tactical advantage over defendants or to harass them.'"

" A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant."

See also United States v. Marion, 404 U.S. 307, 325 (1971) and Pollard v. United States, 352 U.S. 354, 361 (1957).

In short, this panel has permitted the Government to file a false statement of readiness, violate Rule 4 as to readiness and at the same time permit the government to gain a highly important tactical advantage over the appellant, namely, the obtaining of the handwriting exemplars of the appellant after the same was already prohibited to the Government.

This panel has faulted the appellant for the unexpected resignation of Judge Bauman arter the Government had already filed

its alleged statement of readiness. Instead of faulting the Government or the trial court, this panel has illegally faulted the appellant contrary to the cases cited.

In effect, the panel is saying, the appellant can be made to suffer and his rights under Rule 4 violated, because of the resignation of Judge Bauman, even though this delay is not chargeable to the defendant-appellant, a completely erroneous conclusion, even though Government never answered or excused its default.

In reality, the resignation of Judge Bauman or for that matter the disability of any trial judge, is no excuse for the filing of a false statement of readiness by the Government nor any excuse for the Government to violate Rule 4.

This panel also overlooked a decision of this Circuit, United States ex rel. Frizer v. McMann, 437 F.2d 1312, 1317 (2d Cir.)(en banc), cert. denied, 402 U.S. 1010 (1971) where Chief Judge Lumbard speaking for the entire Circuit Court states:

"We cannot excuse denial of due process rights in any particular case where a defendant has not been a party to the delay".

This panel completely overlooked the fact that the appellant herein was in no shape or form guilty of delay nor a party to any delay, and that motion to dismiss the indictment should have been granted on default against the Government.

The failure by the Government to have obtained the handwriting exemplars of the appellant within six months after his arrest and prior to the filing by the Government of its statement of readiness was simply due to the outright negligence on the part of the Government which is not chargeable to the appellant nor to the subsequent resignation of Judge Bauman, as this panel would have us erroneously believe.

The appellant's constitutional rights to due process and equal protection have been violated.

A reversal is mandated.

The Government never even had the temerity or even showed the courtesy or respect to the court to answer the motion to dismiss the indictment or excuse its conduct. The motion to dismiss the indictment should have been granted on default.

POINT IV

THE PANEL OVERLOOKED THE FACT THAT THE SEARCH OF THE WOLFISH APARTMENT ILLEGAL BY AMERICAN STANDARDS CAME AS A RESULT OF CONTACTS BETWEEN UNITED STATES LAW ENFORCEMENT AGENTS AND ISRAELI AUTHORITIES AND WAS THEREFORE ILLEGAL UNDER FOURTH AND FIFTH AMENDMENTS.

The panel states erroneously at slip op. 5644:

"The decision to obtain a search warrant and to conduct the search was made entirely by Israeli officials, and the results of the search were later reported to the U.S. Attorney, through diplomatic channels."

This statement by the panel is in direct contradiction to the statement by the panel at slip op. 5635:

"Contacts between United States law enforcement agents and Israeli authorities, in turn, led to a search of Wolfish's Jerusalem apartment." (emphasis supplied)

The panel was therefore also in error when it stated at slip op. 5644:

"The search does not appear to have been suggested, requested, or directed by any American official."

The language of the panel at slip op. 5635 clearly shows that the said illegal search by the Israeli police was suggested, requested or directed by an American official.

If the Israeli authorities were searching for their own purposes, as is the Government's contention, why did the Israelis on the same day of the search, report to the American authorities the fruits of their search? The fact is the Israelis were searching as the agents of the Americans. United States v. Russell, 411 U.S. 423 (1973).

The panel also erroneously stated at slip op. 5644:

" The district court in denying the motion to suppress, held that the fact that United States officials 'triggered the interests of the Israeli government is of no import.' We affirm this holding." (emphasis supplied)

In effect, the panel is saying, "The fact that the Americans pulled the trigger is of no import, because they didn't know the gun was loaded." The Americans were the proximate cause of the illegal search by the Israelis and also reaped the harvest of the illegal Israeli search and therefore must bear the brunt of the responsibility, namely, the evidence seized should have been suppressed.

The Government suppressed evidence that the search was in

fact requested by American officials, namely, the American consuls John Mallon and John Tefft of Israeli Police Commander Roth. The U.S. Attorney's Office had informed the attorney for appellant prior to the suppression hearing that the Government will produce and make available John Mallon, John Tefft and Israeli Police Commander Roth (see exhibit B attached herewith).

The panel was therefore in error when it stated at slip op. 5644:

"After the hearing had progressed all day, Wolfish, for the first time, asked that Commander Roth of the Israeli National Police and a U.S. State Department official, such as John Mallon or John Toffit, be compelled to appear and testify."

The fact of the matter is that the suppression hearing had only progressed one half day and not one whole day as the panel erroneously stated. The fact of the matter is that John Mallon, John Tefft and Israeli Police Commander Roth were in the Courthouse building during the suppression hearing and the Government refused to produce them.

The Government well knew that if John Mallon, John Tefft and Israeli Police Commander Roth were permitted to testify under oath that their case would go flying out of the window. The attached exhibit B clearly shows that John Mallon, U.S. Consul, Jerusalem, Israel was to appear voluntarily as a Government witness in compliance with a request from the U.S. Attorney, Southern District of New York and that also scheduled to appear voluntarily as Government witnesses were 4 Israeli police officers.

How was Wolfish to know that the Government was going to dishonor its pledge to produce John Mallon, John Tefft and Israeli Police Commander Roth?

The trial court abused its discretion when it failed to direct the Government to produce John Mallon, John Tefft and Israeli Police Commander Roth and this panel erroneously condoned this abuse of discretion.

A reversal is mandated, United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974).

POINT V

THE PANEL OVERLOOKED AND FAILED TO RULE ON POINT VII OF THE APPELLANT'S BRIEF NAMELY THAT THE GOVERNMENT SHOULD HAVE TURNED OVER ALL EXEMPLARS AND REPORTS CONCERNING HOROWITZ TYPEWRITER AS JENCKS AND BRADY MATERIAL

During June, 1972, Government Postal Inspectors obtained exemplars from a typewriter owned and possessed by a crucial and critical Government witness, Israel Horowitz.

The Government in its answering brief on appeal conceded

that indeed it had obtained exemplars from the Horowitz typewriter without admitting that it also possessed expert opinions and reports based on the said exemplars which incriminated both Horowitz as well as his typewriter.

At no time pre-trial, during trial or post trial did the Government concede or admit that it had any Horowitz typewriter exemplars or expert opinions incriminating the Horowitz typewriter and Israel Horowitz.

There is no doubt that the Government possessed both exemplars and reports during the trial concerning the Horowitz typewriter which were entirely exculpatory in nature. (see Exhibit C attached herewith)

At no time did the Government furnish this material to the appellant as either Brady or Jencks as required.

At the close of the case but before closing arguments, defense counsel requested that the Government turn over any reports which would indicate that documents in evidence were typed on Israel Horowitz' typewriter. The Court denied the application.

It should also be remembered that during the course of his testimony Horowitz invoked the Fifth Amendment during the course of his testimony. This Jencks and Brady material should have been given by the Government to the appellant prior to the cross examination of Horowitz. To date the Government has failed to furnish material to the appellant.

When the trial court denied the application of the appellant for this Jencks and Brady material it did so without even asking the Government to confirm or refute the defense allegation.

An examination of these exemplars with the letter written to Emanuel Mack would have shown that the letter to which Horowitz invoked the Fifth Amendment had, indeed been written on his typewriter and would have supported the defense that others were the perpetrators of the crimes with which Wolfish was charged.

In failing to rule on this point in the appellant's brief on appeal before this panel, the panel overlooked the very recent case of United States v. Hilton, Docket No. 74-2675, Decided August 8,1975, Second District, wherein this Court states at slip op. 5473-5474:

"The legal standard to be applied in determining whether a new trial should be granted when the government fails to produce Jencks Act material, 18 U.S.C. 3500, depends on whether the suppression was deliberate or inadvertent. If the government deliberately suppresses evidence or ignores evidence of such high value that it could not have escaped its attention, a new trial is warranted if the evidence is merely material or favorable to the defense. "

The suppression by the government was deliberate and not inadvertent and was called to the attention of the government prior to closing argument and before the summations and the judge's charge to the jury.

The panel also overlooked, United States v. Rosner, No. 74-2290 (2d Cir. filed April 29, 1975); United States v. Sperling, 506 F.2d 1323, 1333 (2d Cir. 1974), cert. denied, 43 U.S.L.W. 3474 (U.S. March 3,1975); United States v. Kahn, 472 F.2d 272, 287 (2d Cir.), cert. denied, 411 U.S. 982 (1973); United States v. Miller, 411 F.2d 825, 832 (2d Cir. 1969); United States v. Keogh, 391 F.2d 138, 147-8 (2d Cir. 1968).

Not only were the Horowitz Typewriter exemplars and reports based thereon Jencks material but they were also Brady material.

"It is the policy of the court that it, and not the United States Attorney's office, will rule on the materiality of evidence which may be only marginally useful to the defense." United States v. Hilton, Docket No. 74-2675, (2d Cir. filed August 8, 1975) at slip op. 5474.

The Horowitz typewriter exemplars and reports based thereon were not only highly material but they were also entirely exculpatory. They should have been made available by the Government to the defense prior to trial or at the very latest prior to the cross-examination of Horowitz.

A reversal is mandated with a dismissal of the indictment.

CONCLUSION

The foregoing constitutional issues, points of law and evidentiary matters, have been so judicially mishandled as to create constitutional problems of the first magnitude. A rehearing is obviously appropriate in these circumstances.

For these various reasons, this petition for rehearing should be granted, and/or the suggestion for a rehearing in banc should be accepted.

The opinion of the panel should be vacated and the judgment of conviction should be reversed.

Respectfully submitted,

Stanley H. Fischer by HB

STANLEY H. FISCHER
Attorney for Appellant
Two Park Avenue
New York, New York 10016

APPENDIX TO PETITION BY APPELLANT FOR REHEARING

1. "On two occasions in January of 1971, appellant--without identifying himself -- visited the Israeli consulate in New York City to have translations of Israeli death certificates authenticated." (emphasis supplied) (Slip Opinion, P. 5634)

"It appears to be, as the Government asserts, that Mrs. Bahrav's identification was not predicated on the spread of pictures but rather on her three face-to-face encounters with reference to the death certificates at the Israeli Consulate in January of 1971. She stated that she had seen him for some ten minutes on each occasion on January 5th, 12th, and 13, 1971." (emphasis supplied) (Slip Opinion, p. 5641-5642).

Just as the panel is not positive from the reading of the record as to the number of times the appellant allegedly visited the Israeli Consulate and Mrs. Bahrav, so Mrs. Bahrav was not positive as to her alleged identification of the appellant:

"A. Yesterday, I said I think this was the man. I didn't say this was the man. I think this was the man." (Tr. p. 700)

The suggestive identification procedures that effected the in-court identification of appellant and an inadequate charge to the jury on the subject deprived the appellant of his right under the constitution to a fair confrontation as secured by the Sixth Amendment.

2. "On the second occasion, he obtained an official stamp which implied the legal validity of the contents of that document. (Slip Opinion, p. 5634-5635)

No where in the entire record of the case was there any testimony that on this second occasion or at any other time did the appellant obtain any official stamp.

3. "He then requested Bankers Life to send claim forms for three insurance policies on his life." (Slip Opinion, p. 5635)

No where in the entire record of the case was there any testimony or evidence that the appellant requested Bankers Life to send any claim forms.

4. "He then submitted these forms." (Slip Opinion,p.5635)

No where in the entire record of the case was there any testimony or evidence that appellant "submitted these forms" or any other forms.

5. " Wolfish left Israel and was a fugitive until February 14, 1974 when he surrendered." (Slip Opinion, p. 5635)

Wolfish left Israel under his own name and American

passport on May 2, 1973, and reentered the U.S.A. on May 10, 1973, under his own name and American Passport.

Wolfish was first indicted by sealed indictment on November 15, 1973, and surrendered voluntarily on February 14, 1974, when he discovered that there was an outstanding indictment against him.

No where in the entire record of the case was there any testimony or evidence that the appellant was a fugitive, nor was he ever charged with having been a fugitive, nor was he ever charged with escape to avoid prosecution.

6. "Testimony at trial showed that the Jewish form of appellant's first name is Leviathan which is translated into English as 'whale'; and the Hebrew translation of "Wolfish" is 'Haim'". (Slip Opinion p. 5635).

The testimony at trial never showed the foregoing and on the contrary any elementary student of Hebrew with any rudimentary knowledge of Hebrew or the Jewish language, could state without any hesitation or doubt that the first name of the appellant, Louis, does not mean Leviathan nor does Louis translate into English as'whale'nor is the Hebrew translation of "Wolfish" "Haim"

7. "In comparing 'known' and'questioned' handwriting samples, the Israeli expert (Mrs. Tamir) had excluded the court-ordered exemplars." (emphasis supplied) (Slip Opinion p. 5639)

"Mrs. Tamir's (the Israeli expert) findings were based on a comparison of the altered death certificate of Wolfish's mother and samples of his known writing, including the court-ordered exemplars." (emphasis supplied) (Slip Opinion p. 5640)

Just as the panel was confused as to the use by the Israeli handwriting expert, Mrs. Tamir, of the court-ordered exemplars, so necessarily must the jury have been confused.

8. "We conclude that the comment of the Government that the disguise was further evidence of guilt was justified and was not a Fifth Amendment violation." (Slip Opinion p. 5640)

This is in clear contradiction with the very recent case of United States v. Chiu, Docket No. 75-1101, (2d Cir. filed August 15, 1975) at slip op. 5656:

"Accordingly, any handwriting sample prepared for the specific purpose of showing dissimilarity of handwriting is inherently suspect and should not be admitted into evidence."

9. "Government Exhibits 45A and 45B, which are two letters addressed to appellant's wife and internally identifiable as having been written by appellant." (Slip Opinion p. 5640)

This is in clear contradiction of, 7 J. Wigmore, Evidence Section 2148 (3d Ed. 1940):

"Accordingly, it seems generally conceded that the mere contents of a written communication, purporting to be a particular person's, are of themselves not sufficient evidence of genuineness."

See also Freeman v. Brewster, 93 Ga. 648, 21 S.E. 165.

The said Government Exhibits 45A and 45B were not authenticated by any witness or evidence and they were photostats and not originals.

10. "Certainly, the remarks of the court with reference to permitting Wolfish to take part as co-counsel in his defense would not require any hearing on his competence to stand trial." (Slip Opinion p. 5645)

This is in direct contradiction with Westbrook v. Arizona, 384 U.S. 150, 86 S.Ct. 1320, 16 L.Ed.2d 429 (1966). In that decision, the Supreme Court gave recognition to a distinction between a defendant's mental competency to stand trial, and his competency to waive his right to counsel at trial. Although the state court had, after hearing, concluded that the defendant was mentally competent to stand trial, the Supreme Court deemed it essential that a further "inquiry into the issue of his competence to waive his constitutional right to the assistance of counsel...." was required. Sieling v. Eyman, 478 F. 2d 211 (9th Cir. 1973).

rtificate of Good Standing AO Form No. 136

ITED STATES OF AMERICA)
) ss.
SOUTHERN DISTRICT OF NEW YORK)

EXHIBIT A

I, RAYMOND F. BURGHARDT , Clerk of the United States DISTRICT COURT, FOR THE SOUTHERN DISTRICT OF NEW YORK ,

DO HEREBY CERTIFY That LOUIS R. WOLFISH was ly admitted to practice in said Court on September 15 , 1959 , d that he is in good standing in said Court.

ted at NEW YORK, N.Y.

AUGUST 15 , 1975 .

RAYMOND F. BURGHARDT ,
Clerk

By _____ ,
Deputy Clerk.

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CASE NO. 195-17113-F, SPRING VALLEY, NY

EXHIBIT B

RE OUR TWX #03, 10/03/74

THE TRIAL OF RABBI LOUIS R. WOLFISH, CHARGED WITH SUBMITTING FALSE ISRAELI DEATH CERTIFICATES TO COLLECT HIS OWN LIFE INSURANCE, IS SCHEDULED TO BEGIN ON 01/06/75. MR. JOHN C. MALLON, U.S. CONSUL, JERUSALEM, ISRAEL WILL APPEAR VOLUNTARILY AS A GOVERNMENT WITNESS IN COMPLIANCE WITH A REQUEST FROM THE U.S. ATTORNEY, SDNY. ALSO SCHEDULED TO APPEAR VOLUNTARILY AS GOVERNMENT WITNESSES ARE 4 ISRAELI POLICE OFFICERS; AN ISRAELI DOCUMENT ANALYST; AN ISRAELI INTERIOR MINISTRY CLERK AND ISRAELI JUDGE EMANUEL HACK.

END SNS

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Exhibit B

C 321—Affidavit of Service of Papers by Mail.
Affirmation of Service by Mail on Reverse Side.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Index No. 75-1138

UNITED STATES OF AMERICA,

Plaintiff

against

LOUIS R. WOLFISH,

Defendant

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at Jersey City, New Jersey

That on August 28th, *19* 75 *deponent served the annexed* Petition for Rehearing and Rehearing in Banc *on* Paul J. Curran, United States Attorney for the Southern District of New York *attorney(s) for* United States of America *in this action at* Foley Square, New York, New York 10007 *the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care and custody of the United States Postal Service within the State of New York.*

Sworn to before me this
28th day of August, 1975

Harry A. Burstein

HARRY H. BURSTEIN
Notary Public, State of New York
No. 24-4607461
Qualified in Kings County
Commission Expires March 30, 1977

Deborah Bokuniewicz

The name signed must be printed beneath

Deborah Bokuniewicz

CHIEF POSTAL INSPECTOR
Washington, DC 20260

July 22, 1975

Mr. Louis Wolfish
64 Essex Street
New York, NY 10002

Dear Mr. Wolfish:

In reply to your July 8, 1975 letter to Mr. E. M. Hamm, Jr., Postal Inspector in Charge, New York, NY, I should like to point out that the arrangement for you to examine at Mr. Hamm's office, Inspection Service records concerning you, was made for the express purpose of saving you the costs of reproduction which, in the alternative, would be charged if copies of the material were to be furnished to you.

There are approximately 35 pages of material which can be made available to you. These records do not include any exemplars from the typewriter of Rabbi Israel Horowitz, or any expert opinions based thereon, as this material is in the custody of the United States Attorney's office. Not included, further, is a copy of the Inspection Service presentation letter to the United States Attorney for which exemption from disclosure under Title 5, United States Code, Section 552 (b) (5) is asserted.

Upon receipt of your check or money order for $11.50, payable to the United States Postal Service, representing charges for one hour search time of $8.00 and $3.50 for reproduction costs, pursuant to the schedule of fees published in the Federal Register, Vol. 40, No. 34, on February 19, 1975, this material will be furnished to you. I do not feel that I can waive these charges you request.

Sincerely,

William J. Cotter
Chief Inspector

EXHIBIT

Exhibit C